83-1610

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ALEXANDER L. STEVAS
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

H.D. GROSS and HELEN GROSS,

*Appellants,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

Questions presented in this case are whether the administration of Amendment XVI to the Constitution of the United States providing for an income tax must be with reference to the provisions of Article I, Section 8, Clause 1 which requires that taxes be laid uniformly throughout the United States.

The case presents the further question of whether or not the appellee should be permitted to declare that all bank deposits are taxable income in a case where a taxpayer has kept accurate records of taxable income.

## PARTIES TO THE PROCEEDING BELOW

All parties appear in the caption of the case in the United States Supreme Court.

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## JURISDICTIONAL STATEMENT

### OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is printed in Appendix "A" hereto. It has not been published in the Federal Reporter pursuant to Rule 21(c) of that Court.

## JURISDICTION

The grounds on which the jurisdiction of the Court is invoked are that the income tax amendment to the United States Constitution is not being administered in accordance with the requirement of uniformity and that the procedure of appellee in declaring that all bank deposits are taxable income is a deprivation of due process of law in a case where a taxpayer has kept accurate records of taxable income.

The nature of the proceeding below is the review of a claim for a tax refund for 1976 and 1977.

The judgment petitioner seeks to have reviewed is dated January 3, 1984 and was entered on that date.

The jurisdiction of this court is invoked under Section 1257(2) of Title 28 of the United States Code.

The following cases sustain jurisdiction: Brushaber v. Union Pacific Railroad Co., 240 U.S. 1 (1916); Holland v. United States, 348 U.S. 121, 132 (1954).

A copy of the judgment of the Court of Appeals for the Ninth Circuit is included in Appendix "A" appended hereto.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 1:

"Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of

the United States; but all duties, imposts and excises shall be uniform throughout the United States. . . ."

## STATEMENT OF CASE

H.D. Gross had been self-employed in the construction industry for a period of over twenty years prior to the tax years of 1976 and 1977. He had regularly and accurately kept account of all income declared taxable by the Internal Revenue Code. He did not keep records of bank deposits with regard to whether such deposits were transfers from one account to another, deposits of tax-free municipal bond income, gifts, or other non-income items.

For the audit of the tax years in question, appellee demanded, without any reasonable cause or justification, that H. D. Gross "back out" from his total of bank deposits all the deposits which were not taxable. H. D. Gross declared that he had not kept records of non-taxable deposits but that his taxable income was as specified on his income tax returns. Appellee thereupon declared that all bank deposits were taxable income.

H. D. Gross paid the tax and challenged the said determination in a complaint filed in the Federal District Court. He also contended that the constitutional amendment which provided for an income tax was not being administered in accordance with the requirement that all taxes be uniform through-

out the United States.

The trial court granted summary judgment to appellee and refused to permit H. D. Gross to have a trial on the question of whether or not his records of income were in fact accurate. The trial court granted summary judgment on the question of the proper administration of the income tax law.

H. D. Gross appealed to the United States Court of Appeals for the Ninth Circuit and the judgment of that Court is included in Appendix "A" appended hereto.

## SUBSTANTIALITY OF FEDERAL QUESTIONS

The deprivation of due process of law by the procedure employed by the appellee in making a determination that all bank deposits are income is substantial in a case where a taxpayer for many years has demonstrated his integrity and honesty in disclosing all income and where the taxpayer is prevented from having a trial on the question of the accuracy of his accounting of taxable income.

The contention that the income tax under the Sixteenth Amendment must be applied equally throughout the United States is significant and substantial and has been the subject of recent debate in Congress.

Agreement therewith by this Court would result in the transformation of appellee's ability to use the income tax law to control social policy and would result in equality in right, in protection and in burden between persons subject to the tax.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that probable jurisdiction should be noted.

Respectfully Submitted,
Peter Amschel
Counsel for Appellant

# APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

H.D. GROSS and HELEN GROSS,

Plaintiff/Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant/Appellee.

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No. 83-5575
D.C. No. CV 82-2236-R

MEMORANDUM

FILED
Jan. 3, 1984
Phillip B. Winberry
Clerk, U.S. Court of Appeals

On Appeal from the United States
District Court for the
Central District of California
Hon. Manuel L. Real,
District Judge, Presiding

Submitted -- October 20, 1983

Before: TANG, FERGUSON and BOOCHEVER,
Circuit Judges.

H. D. Gross and Helen Gross[1] appeal from the summary judgment order in favor of the United States and the dismissal with prejudice of their claim for a tax refund for 1976.

Gross contends that in the taxable year 1976 and 1977 his traveling expenses to Hemet, California are deductible as business expenses. Gross failed to produce evidence sufficient to support his claim of business deductions. Commissioner v. Flowers, 326 U.S. 465 (1946); Neal v. Commissioner, 681 F.2d 1157 (9th Cir. 1982). We have reviewed the documents excluded by the district court, and find that even if they were admitted into evidence they do not provide the necessary support.

Gross's argument that the progressive income tax is unconstitutional is

frivolous. Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916). His contention that the bank deposit method of determining taxable income may not be used to determine taxable income where a taxpayer has records of his expenses is similarly without merit. Holland v. United States, 348 U.S. 121, 131 (1954). Gross failed to present proof to rebut the IRS's assessment of taxable income. Lewis v. Commissioner, 560 F.2d 973, 976 (9th Cir. 1977). No issue of material fact exists. Summary judgment, therefore, was proper.

AFFIRMED.

1. Helen Gross is a party only because she and her husband filed joint tax returns. All references to taxpayer are to E. D. Gross.

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H.D. GROSS and HELEN GROSS,

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# APPENDICES TO JURISDICTIONAL STATEMENT

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

H. D. GROSS AND
HELEN R. GROSS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

---

NO. CV 82-2236-R

JUDGMENT

FILED December 12, 1982

This action came on for hearing, the Honorable Manuel L. Real presiding, and the issues having been duly heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED:

1. That plaintiffs take nothing by their complaint and that plaintiffs'

complaint and action be dismissed with prejudice.

2. That the United States shall have its costs incurred in this action.

DATED: This 12th day of December, 1982.

MANUEL S. REAL

UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT

CENTRAL DISTRICT OF CALIFORNIA

H. D. GROSS AND
HELEN R. GROSS,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

---

NO. CV 82-2236-R

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

FILED December 12, 1982

This action came on for hearing before the Court, the Honorable Manuel L. Real, District Judge, presiding on December 20, 1982. The plaintiffs were represented by Peter Amschel, Esq. The defendant was represented by Stephen S. Trott, United States Attorney, Central

District of California, Charles H. Magnuson, Assistant United States Attorney, Chief, Tax Division, with an appearance by William J. James, Assistant United States Attorney. The issues having been duly tried and a decision having been rendered, the Court makes Findings of Fact and Conslusions of Law as follows:

## FINDINGS OF FACT

1. This is an action seeking to recover federal income taxes paid by plaintiffs for the years 1976 and 1977. Plaintiffs' claims arise out of: 1) The disallowance of deductions claimed for expenses incurred by plaintiff-husband traveling to, and lodging and dining at, his principal place of business; 2) The disallowance of deductions claimed for

the expense of hiring a gardener at plaintiffs' residence, and 3) A deficiency assessed with respect to unreported income received by plaintiffs.

2. Plaintiffs maintained a family residence in Santa Monica, California, at all times relevant to this action. In or before 1965, Mr. Gross became involved in business dealings in the area of Hemet, California, where he established a constructions business. From the middle of 1972 through 1978, Mr. Gross spent the work week in the Hemet area as the sole proprietor of his business and returned to Santa Monica to spend weekends with his family. Plaintiffs claimed as business deductions expenses allegedly incurred by Mr. Gross for automobile travel between his residence in Santa Monica and the Hemet job

site as well as expenses for meals and lodging incurred during the week.

3. Deductions were also taken by the taxpayers on their 1976 and 1977 returns for expenses allegedly incurred in employing a gardener at their private residence in Santa Monica. Plaintiffs' sole contention with respect to this deduction is that employing a gardener allowed Mr. Gross more time to pursue his business and the production of income.

4. In addition to disallowing the above deductions, the Internal Revenue Service determined that plaintiffs failed to report taxable income in the amount of $35,689.00 in 1976 and $24,006.00 in 1977. Plaintiffs disagreed with these determinations but refused to answer any questions asked

about the additional amounts of income determined by the Internal Revenue Service.

5. On February 16, 1981, the Internal Revenue Service entered a deficiency assessment against the plaintiffs in the amount of $13,091.00 with respect to the year 1976, and $20,929.54 with respect to the year 1977. On March 23, 1981, plaintiffs paid $44,545.65 which was applied against the above assessments together with interest and penalties accrued thereon. Plaintiffs submitted an administrative claim for refund of this amount together with their payment. On June 1, 1981, plaintiffs paid an additional $581.13 which was applied to satisfy the balance of penalties and interest due. Plaintiffs did not file

an administrative claim for refund with respect to this amount.

6. Any Conclusion of Law deemed to be a Finding of Fact is hereby found to be a Fact.

## CONCLUSIONS OF LAW

1. "An action to recover on a claim for refund is in the nature of an action for money had and received, and it is incumbent upon the claimant to show that the United States has money which belongs to him. Not only must the plaintiff show that the Commissioner was wrong, but he must go further and establish the essential facts from which a correct determination of his tax liability can be made. The burden is on the taxpayer to establish the exact amount to which he is entitled. To sustain the

burden upon him, the taxpayer must prove the legality and amount of any deductions claimed." Arkhola Sand & Gravel Co. v. United States, 190 F.Supp. 29, 36-37 (W.D. Ark. 1960); Lewis v. Reynolds, 284 U.S. 281 (1932); Missouri Pacific R.R. Co. v. United States, 338 F.2d 668, 671 (Ct.Cl. 1964); Larrabee v. United States, 37 F.R.D. 61 (C.D. Cal. 1965); First Nat. Bank of Miami v. United States, 235 F.Supp. 331, 337 (S.D. Fla. 1964).

2. Where a taxpayer resides in one city and has his principal place of business in another, his expenses of cummuting between his residence and his work are personal, and not deductible as business expenses. 26 U.S.C. § 262; Commissioner v. Flowers, 326 U.S. 465 (1946); Commissioner v. Stidger, 386

U.S. 287 (1967); Wills v. Commissioner, 411 F.2d 537, 541 (9th Cir. 1969). Mr. Gross established his construction business in the Hemet Valley area years before the periods here in issue. He derived substantially all of his income from his employment in the Hemet Valley area, and his choice to raise his family in Santa Monica was personal.

3. Unless specifically provided for in Chapter 1 of the Internal Revenue Code, no deduction is allowed for personal, living, or family expenses. 26 U.S.C. § 262. The expenses of maintaining a household are specifically included in this category. 26 C.F.R. § 1.262-1(b)(3). Even if some portion of one's home were deductible, the expenditures for lawn care and landscaping would not be. Rev. Rul. 62-180, 1962-2

C.B. 52, 53. Plaintiffs' attempt to deduct the costs of their gardener is unsupported by any legal authority.

4. Congress intended to tax, "all whatever source derived" unless specifically excluded by law. 26 U.S.C. § 61; Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955). Where as here, a taxpayer fails or refuses to rebut the presumption of correctness which attaches to the assessment entered by the Internal Revenue Service, such assessment must be sustained. United States v. Molitor, 337 F.2d 917, 922-23 (9th Cir. 1964).

5. The Federal Income Tax Laws, Title 26 of the United States Code, do not violate Article 1, Section 9, Clause 4 of the Constitution. Sixteenth Amendment; Brushaber v. Union Pacific R.R.

Co., 240 U.S. 1 (1916); Kerr v. Commissioner, 326 F.2d 225 (9th Cir. 1964). The argument here advanced by plaintiffs, that the income tax is unconstitutional because it is direct and nonuniform, has been rejected as frivolous. Lonsdale v. Commissioner, 661 F.2d 71 (5th Cir. 1981).

6. The District Court lacks jurisdiction with respect to those payments made subsequent to the filing of plaintiffs' administrative claim for refund. 26 U.S.C. § 7422(a).

7. Plaintiffs shall take nothing by their Complaint and Judqment shall be entered on behalf of the defendant, United States of America.

8. Any Finding of Fact deemed to be a Conclusion of Law is hereby concluded as a matter of law.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 12, 1982

MANUEL S. REAL

UNITED STATES
DISTRICT JUDGE